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GENERAL AVIATION ACCIDENT LIABILITY STANDARDS ACT OF 1989

MAY 23 (legislative day, APRIL 18), 1990.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 640]

The Committee on the Judiciary, having considered S. 640 to regulate interstate commerce by providing for uniform standards of liability for harm arising out of general aviation accidents, having considered the same, reports unfavorably thereon and recommends that the bill do not pass.

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I. PURPOSE

The purpose of this bill is to establish uniform Federal product liability standards for harm arising out of a general aviation accident. This legislation is designed to provide special protections and incentives to the general aviation industry.

II. LEGISLATIVE HISTORY

On March 16, 1989, Senator Kassebaum introduced S. 640. This bill is identical to legislation reported by the Commerce Committee in the 99th and 100th Congresses. During the 100th Congress, this legislation was sequentially referred to the Judiciary Committee with a 30-day time limitation. The Judiciary Subcommittee on Courts and Administrative Practice conducted a hearing on the bill. No further action was taken by the Judiciary Committee, and at the end of the 30-day time period the bill was sent to the floor of the Senate.

During the 101st Congress, a hearing on S. 640 was conducted by the Commerce Subcommittee on Aviation on June 21, 1989. On October 5, the Commerce Committee met in open session and ordered the bill favorably reported by voice vote. The bill was reported by the Commerce Committee on November 21, 1989. On January 31, 1990, S. 640 was sequentially referred to the Judiciary Committee. A unanimous consent request governing this referral provided that the Judiciary Committee maintain jurisdiction over this bill through April 5, 1990. The Judiciary Committee held a hearing on S. 640 on March 9, 1990.

On April 5, 1990, the Judiciary Committee met in open session to consider S. 640. Two votes were taken on S. 640. The first vote was to report S. 640 without recommendation. The motion failed by a vote of 7 to 6. The second vote was to report S. 640 unfavorably. This motion was agreed to by a vote of 10 to 2.

III. DISCUSSION

A. Introduction

The General Aviation Accident Liability Standards Act should not be passed by the Senate and enacted into law. The bill has not been proven to be necessary and would represent an unwise policy decision on the part of the Senate, if adopted. Further, a number of the specific substantive provisions of the bill are so problematic that the entire bill is fatally flawed. Therefore, it is the view of the Judiciary Committee that this legislation should not be passed by the Senate.

B. Policy Concerns

Proponents of this legislation argue that this bill is needed to aid a failing general aviation industry. The committee recognizes that this is an important industry, one that is vital to our national interests. Further, the committee recognizes that since the early 1980's there has been a decline in the demand for new general aviation aircraft. However, recent figures indicate that over the past 2 years there has been a substantial increase in the number of general aviation aircraft produced in the United States. In fact, ac-

cording to the General Aviation Manufacturers Association, airplane shipments by U.S. manufacturers were up 26.7 percent in 1989. See "Mixed Signals," *AOPA Pilot* (March, 1990), p. 44. These recent developments indicate that a turnaround in this industry need not be accomplished through the abandonment of centuries of developed individual State tort law, and that solutions lie elsewhere.

The previous decline of the general aviation industry is based upon many factors. The Congressional Research Service has noted, "[n]o single factor can explain the collapse of demand for new general aviation aircraft." [Footnote: Congressional Research Service (Fischer and Arabian), "The Demand for General Aviation Aircraft: Background, Analysis and Outlook," Report No. 85-1108E (December 6, 1985) at 6.] This assessment, that "[t]he general decline in the general aviation sales in the 1980's is shown to be the result of numerous interdependent factors in the overall aviation environment," was acknowleged in a paper presented by a representative of Cessna Aircraft Co. at the 1987 American Institute of Aeronautics and Astronautics meeting on Aircraft Design, Systems and Operations (September 14-16, 1987, p.1). The representative of Cessna went on to note that a number of negative influences have affected the industry in recent years, including: airline deregulation (1978), high interest rates (1979-1982), OPEC oil prices (1979-1983), economic recessions in the early 1980's, an air traffic controllers' strike (August 1981), the end of the GI bill flight training benefits (1992), the growth of corporate mergers and takeovers, and the loss of World War II support infrastructure. *Id.* at 2. Obviously, these and other factors have lead to the weakening of the general aviation industry. Further, this combination of responsible factors has been acknowledged by the Federal Aviation Administration. U.S. Department of Transportation, Federal Aviation Administration, "FAA Aviation Forecasts, Fiscal Years 1988-1999," February 1988, at p. 70. Given these facts, it is impossible to reach the conclusion that solely the imposition of national product liability standards will somehow return this industry to the prosperity it once enjoyed.

A number of potential measures to solve this industry decline are either in place or less intrusive than this legislation.

For example, a recent GAO report, released on November 13, 1989, is extremely critical of the FAA's safety inspection management system. The report concluded by noting that

> [i]nadequate oversight of the inspection program resulted in (1) FAA headquarters management's being unaware that its inspection policies were not always followed by local FAA staff and (2) inaccurate reporting to Congress of FAA achievements.

GAO Report, "FAA's Inspection Management System," GAO/RCED-90-36.

Further, in a recent article, the chairman of Cessna Aircraft was quoted to say,

> "With tougher airworthiness requirements implemented aggressively by the FAA, and with type-specific flight

> standards, I believe it is realistic to reduce the level of accidents by at least 50 percent." That reduction of accidents would reduce liability costs by at least 50 percent. Meyer said, "A point at which production of new single-engine aircraft once again becomes economically feasible."

AOPA Pilot, "G.A. Manufacturers Propose New Inspections," (June, 1989).

These possible measures are not meant to be necessarily the best remedies available, but rather are indicative of other courses of action that are more appropriate areas in which Congress could act.

The supporters of S. 640 point to the arguable uniqueness of the general aviation industry in attempting to justify the remedies found in this bill. However, this argument is flawed. The general aviation industry is one of many industries that are subject to limited Federal safety controls. Further, these minimal Federal safety standards should not be used to negate the responsibility that this industry has to the American public for maintaining safety in its products.

The creation of national product liability standards for the general aviation industry is contrary to historical precedent and would establish a dangerous standard to follow. Unlike the areas of patent or admiralty law, there is no special historical or constitutional precedent that would support national standards for aviation law. Further, our Nation was founded upon the fundamental principle of federalism. The tenth amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The establishment of a national tort compensation scheme was never intended by the framers of the Constitution. History teaches that a long line of common law, generally descended from old English law, has developed in the individual States. To the extent that differences exist between the various tort compensation schemes found in each of the States, these schemes should be an issue of pride and a tower of strength for the U.S. legal system. A homogenized legal system would not take into account the cultural and historical foundations found in each of the states. The step toward a unified system of tort compensation, as suggested by this bill, is a dangerous precedent that might upset the delicate balance of power that has been established over centuries between the Federal Government and the several states. Thus, the enactment of this legislation would violate fundamental principles upon which this Nation was founded, and therefore would create unwise legislative precedent.

Upon analysis of both the economic and public policy principles underlying S. 640, it becomes clear that this bill should not be enacted.

C. Substantive Provisions

In addition to the policy arguments against enactment of S. 640, the substantive provisions of the bill are so flawed as to provide further grounds to indicate that this bill should not be passed. Although there are many problems found throughout the bill, this

report will only attempt to outline some of the major problems found in the major sections of the bill.

Section 3 establishes the definitions to be used for the purposes of this bill. The bill contains an expansive definition of "general aviation aircraft." This definition would include within its scope gliders, helicopters, and hot air ballons. No testimony has been given to suggest that these aircraft need the special protections afforded by this bill. Further, proponents of this bill attempt to portray the bill as having consumer support. However, some of the users of these aircraft (such as medivac helicopters) are not voluntary passengers, and therefore should not be required to forfeit their substantive rights under current State law by the involuntary use of a general aviation aircraft.

Section 4 of S. 640 provides that the bill preempts any State law regarding harm arising from a general aviation accident. In addition to the public policy concerns of such a section, further problems would be created. This section would create categories by which different individuals, whose injuries arose from a single accident, would have to look to different applicable law in order to recover. For example, passengers of a general aviation aircraft that has an accident with a commercial aircraft would have to recover under this bill, while the commercial passengers would look to applicable state law for recovery. This curcumstance would create havoc in the courts, would result in delay and costly litigation, and could potentially result in substantial differences in the ability to recover being based merely on the aircraft that individual happened to be a passenger on.

An additional problem with section 4 is the potential difficulty that would arise in States. Many States have recently enacted or are considering reforming their own State tort laws. If the Federal Government steps into this area of traditionally State tort law, balances established on the State and local level may be severely disrupted.

Section 5 of the bill attempts to outline standards of liability for recovery under this legislation. A number of problems arise in this section. First, the bill does not provide for recovery under the doctrine of implied warranty or other State-imposed doctrines. Implied warranty is widely used and recognized in this country. Under this doctrine, a manufacturer has the responsibility of providing implied warranties regarding a particular product when that product is introduced into the marketplace. The abandonment of this doctrine would be a major abrogation of the responsibility a manufacturer owes the consuming public.

Second, this section provides for a defense to liability based upon the noncompliance with a manufacturer's service bulletin. These bulletins are made at the complete discretion of a manufacturer and vest no legal responsibility in compliance. To create this defense would allow a manufacturer to abdicate substantial responsibility for its product and would be unfair to both the owners and users of a general aviation product and to a potential claimant.

Finally, under section 5, where standards of liability for faulty design or construction are established, tremendous problems arise. The bill provides for liability to attach for harm that was proximately caused by a product that "was in a defective condition un-

reasonably dangerous for its intended purpose, according to engineering and manufacturing practices which were reasonably feasible." This standard is derived from section 402A of the Restatement (Second) of Torts. This standard embodies the "state of the art" defense. However, in this legislation, it appears that the plaintiff must carry the burden of proof regarding the defective condition rather than the generally accepted strict liability standard being placed upon the defendant. Further, the bill provides that under this method of recovery, an injured plaintiff would have the burden of proving the aircraft was being used in a manner for which it was designed and manufactured. This would seem to relieve the manufacturer of liability for any use, no matter how foreseeable, that the manufacturer did not specifically intend. A classic example of such a situation would be where a pilot is forced to take drastic actions in an emergency. Clearly, this provision does substantial violence to commonly held notions regarding strict product liability standards.

These and other problems arise from section 5, which attempts to establish standards of liability, but which in reality establish barriers for injured parties to receive fair and just compensation for their injuries.

Section 6 of S. 640 establishes the general principle of comparative responsibility. Some States have adopted comparative responsibility as a standard for tort recovery. However, this is not a standard that has uniform acceptability. A consequence of such a standard is that some injured parties would not be able to receive full compensation for their injuries. These injuries would have to be absorbed by the injured parties while some responsible parties could simply abandon the non-fully-compensated claimant. Given the divergence of attitudes and the potential hardships found under this system, Congress should not accept the notion of comparative responsibility.

Section 7 of S. 640 is arguably the most offensive part of this legislation. This section establishes a general 20-year statute of repose for actions which might be brought under this bill. Under the terms of this bill, generally no one could recover for harm arising from an accident involving a general aviation aircraft that is over 20 years old. It is important to note that the average age of general aviation aircraft in this country is approximately 23 years. If this bill were adopted, Congress would be exempting over half the aircraft in the country from potential recovery. As a result, general aviation manufacturers would be receiving a windfall at the consuming public's expense. Although some States have established some statutes of repose, for Congress to impose such strict barriers to recovery would not be in the best interests of this Nation.

Finally, section 13 of the bill establishes concurrent state and Federal jurisdiction. Currently, the Federal courts are severely burdened with huge caseloads, and to add additional cases to the Federal docket without a clearly perceived need would be a waste of federal judicial resources. A further result of this bill would be that there would not only be 50 different interpretations of this act in each of the 50 States, but there would also be additional interpretations by the Federal courts. Such a result would create havoc in the courts of this Nation regarding the appropriate interpretation

of this act. Clearly, this section flies in the face of one of the stated purposes of this bill; namely, to bring uniformity to the field of general aviation law. For these reasons, this section is substantially flawed.

D. Conclusion

The General Aviation Accident Liability Standards Act, S. 640, is not necessary, would set bad public policy, and should not be enacted by the Senate. Substantial policy concerns cloud the articulated need for this bill and represent an important threat to the legal foundations upon which our Nation was founded. Further, the substantive provisions of this bill are so flawed as to require that this bill not be passed into law. Therefore, it is the view of the Committee on the Judiciary that this bill should not be passed by the Senate.

IV. VOTE OF THE COMMITTEE

On April 5, 1990, with a quorum present, the Committee on the Judiciary conducted two votes relating to S. 640.

A motion to report S. 640 without recommendation failed by a vote of 7 to 6. Senators were recorded as voting upon the motion to report without recommendation as follows:

YES (6)	*NO (7)*
Thurmond	Kennedy
Hatch	Metzenbaum
Simpson	Leahy
Grassley	Heflin
Specter	Simon
Humphrey	Kohl
	Biden

A motion to report S. 640 with a negative recommendation was adopted by a vote of 10 to 2. Senators were recorded as voting upon the motion to report with a negative recommendation as follows:

YES (10)	*NO (2)*
Kennedy	Hatch
Metzenbaum	Grassley
Leahy	
Heflin	
Simon	
Kohl	
Thurmond	
Simpson	
Specter	
Biden	

V. TEXT OF S. 640

[101st Cong., 1st sess.]

A BILL To regulate interstate commerce by providing for uniform standards of liability for harm arising out of general aviation accidents

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "General Aviation Accident Liability Standards Act of 1989".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) transportation by air of passengers continues to comprise an increasingly important component of the Nation's overall transportation system;

(2) although the incidence of injuries to passengers in general aviation accidents has decreased, the number of general aviation accident liability claims against general aviation aircraft manufacturers and the amount of damages sought in such claims is increasing at disproportionate rates, beyond any relationship to the quality of the aircraft manufactured and in use;

(3) the current system for determining liability and damages for compensating individuals injured in general aviation accidents is inadequate;

(4) competent general aviation manufacturers and component part manufacturers are ceasing or limiting production of general aviation aircraft or some models of such aircraft because of the increasing costs and unavailability of product liability insurance;

(5) the increase in the number of liability claims and the size of awards and settlements, and the excessive time and expense devoted to the resolution of such claims, impose a substantial economic burden on general aviation manufacturers and their dealers;

(6) the Federal Government has an interest in the general aviation accident liability system because the Federal Government has established a comprehensive system for regulating general aviation, including—

(A) establishing standards for design, construction, and certification of general aviation aircraft,

(B) establishing standards for maintenance of aircraft, licensing of repair facilities, and licensing of persons who may perform or approve maintenance, repairs, and inspections,

(C) establishing standards for training and licensing of pilots,

(D) establishing a comprehensive air control system,

(E) conducting investigations to determine the probable cause of aviation accidents and prevent future accidents, and

(F) conducting other activities necessary to assure a safe air transportation system;

and this Federal system is the exclusive legal authority for regulating aviation operations and safety;

(7) it is in the national interest to reduce unnecessary expenditures related to general aviation accident liability claims while providing more rapid and more

efficient compensation for individuals harmed in general aviation accidents; and

(8) Federal action to reform the general aviation accident liability system will result in—

(A) the maintenance of airworthy general aviation aircraft; and

(B) a more rational general aviation accident liability system.

(b) It is the purpose of this Act to establish standards for determining liability for harm arising out of general aviation accidents.

DEFINITIONS

SEC. 3. As used in this Act, the term—

(1) "Administrator" means the Administrator of the Federal Aviation Administration;

(2) "claimant" means any person who brings a general aviation accident liability action subject to this Act, and any person on whose behalf such an action is brought, including—

(A) the claimant's decedent; and

(B) the claimant's parent or guardian, if the action is brought through or on behalf of a minor or incompetent;

(3) "general aviation accident" means any accident which arises out of the operation of any general aviation aircraft and which results in harm;

(4) "general aviation aircraft" means any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator under the Federal Aviation Act of 1958 (49 App. U.S.C. 1301 et seq.) which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than twenty passengers, and which is not, at the time of the accident, engaged in scheduled passenger carrying operations as defined in regulations issued under the Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.);

(5) "general aviation manufacturer" means—

(A) the builder or manufacturer of the airframe of a general aviation aircraft;

(B) the manufacturer of the engine of a general aviation aircraft; and

(C) the manufacturer of any system, component, subassembly, or other part of a general aviation aircraft;

(6) "harm" means—

(A) property damage or bodily injury sustained by a person;

(B) death resulting from such bodily injury;

(C) pain and suffering which is caused by such bodily injury; and

(D) emotional harm (including bereavement and loss of affection, care, or society) which is caused by such bodily injury;

(7) "product" means a general aviation aircraft and any system, component, subassembly, or other part of a general aviation aircraft; and

(8) "property damage" means physical injury to tangible property, including loss of use of tangible property.

PREEMPTION; APPLICABILITY

SEC. 4. (a) This Act supersedes any State law regarding recovery, under any legal theory, for harm arising out of a general aviation accident, to the extent that this Act establishes a rule of law or procedure applicable to the claim.

(b) Nothing in this Act shall be construed to supersede or to waive or affect any defense of sovereign immunity asserted by the United States or any State.

(c) Nothing in this Act shall be construed to affect the liability of a manufacturer, owner, or operator of any aircraft that is not a general aviation aircraft, or a person who repairs, maintains, or provides any other support for any aircraft that is not a general aviation aircraft, for damages for harm arising out of the operation of an aircraft that is not a general aviation aircraft.

(d) No right of action for harm exists under this Act if that right would be inconsistent with the provisions of any applicable workers' compensation law.

(e) The provisions of this Act shall apply only to—

(1) any manufacturer, owner, or operator of any general aviation aircraft, and any person who repairs, maintains, or provides any other support for such an aircraft;

(2) any occupant of a general aviation aircraft at the time of a general aviation accident, and any person who brings an action for harm caused by such accident on behalf of such occupant; and

(3) any nonoccupant of a general aviation aircraft at the time of a general aviation accident, only if such nonoccupant is bringing an action for harm caused by such accident which arises out of the harm to an occupant of such aircraft at the time of such accident.

UNIFORM STANDARDS OF LIABILITY FOR GENERAL AVIATION ACCIDENTS

SEC. 5. (a) Any person claiming damages for harm arising out of a general aviation accident may bring an action against a party and may recover damages from such party, if such party was negligent and such negligence is a proximate cause of the claimant's harm.

(b)(1) Any person claiming damages for harm arising out of a general aviation accident may bring an action against a general aviation manufacturer of a product and may re-

cover damages from such general aviation manufacturer if—

(A) the product, when it left the control of the manufacturer, was in a defective condition unreasonably dangerous for its intended purpose, according to engineering and manufacturing practices which were reasonably feasible;

(B) the defective condition is a proximate cause of the claimant's harm; and

(C) the general aviation aircraft was being used at the time of the accident for a purpose and in a manner for which it was designed and manufactured.

(2) Any person claiming damages for harm arising out of a general aviation accident may bring an action against a general aviation manufacturer of a product and may recover damages from such general aviation manufacturer if—

(A) at the time the product left the control of the manufacturer, the manufacturer—

(i) knew, or in the exercise of reasonable care should have known, about a danger connected with the product that caused the claimant's harm; and

(ii) failed to provide the warnings or instructions that a person exercising reasonable care would have provided with respect to the danger which caused the harm alleged by the claimant, unless such warnings or instructions, if provided, would not have materially affected the conduct of the user of the product; or

(B) after the product left the control of the general aviation manufacturer, the manufacturer—

(i) knew, or in the exercise of reasonable care should have known, about the danger which caused the claimant's harm; and

(ii) failed to take reasonable steps to provide warnings or instructions, after the manufacture of the product, which would have been provided by a person exercising reasonable care, unless such warnings or instructions, if provided, would not have materially affected the conduct of the product user;

and the failure to provide warnings or instructions described in subparagraph (A) or (B) of this paragraph is a proximate cause of the claimant's harm.

(3) Any person claiming damages for harm arising out of general aviation accident may bring an action against a general aviation manufacturer of a product and may recover damages from such general aviation manufacturer if—

(A) the manufacturer made an express warranty with respect to the product;

(B) such warranty relates to that aspect of the product which caused the harm;

(C) the product failed to conform to such warranty; and

(D) the failure of the product to conform to such warranty is a proximate cause of the claimant's harm.

(c)(1) In an action governed by subsection (b) of this section, a general aviation manufacturer shall not be liable if such manufacturer proves, by a preponderance of the evidence, that—

(A) the defective condition could have been corrected by compliance with action described in an airworthiness directive issued by the Administrator or a service bulletin issued by the manufacturer of the product; and

(B) such directive or service bulletin was issued at a reasonable time before the date of the accident and after the product left the control of the general aviation manufacturer.

(2) In any action governed by subsection (b) of this section, evidence of compliance with standards, conditions or specifications established, adopted or approved by the Federal Aviation Administration shall be admissible with regard to whether the product was defective and unreasonably dangerous for its intended purpose.

COMPARATIVE RESPONSIBILITY

SEC. 6. (a) All actions for harm arising out of a general aviation accident shall be governed by the principles of comparative responsibility. Comparative responsibility attributed to the claimant's conduct shall not bar recovery in an action under this Act, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant. The trier of fact shall determine comparative responsibility by making findings indicating the percentage of total responsibility for the claimant's harm attributable to the claimant, each defendant, each third-party defendant, and any other person not a party to the action.

(b) Except as provided in subsection (c) of this section, a defendant is severally but not jointly liable in any action for harm arising out of a general aviation accident, and the liability of any defendant in any such action shall be determined on the basis of such defendant's proportionate share of responsibility for the claimant's harm.

(c) In any action for harm arising out of a general aviation accident—

(1) a general aviation manufacturer who is the builder or manufacturer of the airframe of the general aviation aircraft involved is jointly and severally liable for harm caused by a defective system, component, subassembly, or other part of such aircraft that the manufacturer installed or certified as part of the original type design for such aircraft; and

(2) a general aviation manufacturer who is the manufacturer of a system or component of the general aviation aircraft involved is jointly and severally liable for damages caused by a defective subassembly or other part of such system or component.

(d) A general aviation manufacturer and any other person jointly liable under subsection (c) of this section shall have the right to bring an action for indemnity or contribution against any person with whom they are jointly liable under subsection (c) of this section.

TIME LIMITATION ON LIABILITY

SEC. 7. (a) Except as provided in subsection (b) of this section, no civil action for harm arising out of a general aviation accident which is brought against a general aviation manufacturer may be brought for harm which is alleged to have been caused by an aircraft or a system, component, subassembly, or other part of an aircraft and which occurs more than—

(1) twenty years from—

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such an aircraft; or

(2) with respect to any system, component, subassembly, or other part which replaced another product in, or which was added to, the aircraft, and which is alleged to have caused the claimant's harm, twenty years from the date of the replacement or additon.

(b) Subsection (a) of this section does not apply in the case of harm to a claimant which occurs after the period set forth in subsection (a) of this section if the general aviation manufacturer or the seller of the product that caused the claimant's harm gave an express warranty that the product would be suitable, for the purpose for which it was intended, for a longer period of time.

(c) Nothing in this section shall be construed to affect a person's duty to provide, after the sale or lease of an aircraft, to aircraft owners, and to repair facilities to which a license or certificate to perform repairs has been issued by the Administrator, additional or modified warnings or instructions regarding the use or maintenance of such aircraft or any system, component, or other part of such aircraft.

SUBSEQUENT REMEDIAL MEASURES

SEC. 8. In any general aviation accident liability action governed by this Act, evidence of any measure taken after an event which, if taken previously, would have made the event less likely to occur is not admissible to provide liabil-

ity. Such evidence is admissible to the extent permitted under rule 407 of the Federal Rules of Evidence.

ADMISSIBILITY OF CERTAIN EVIDENCE

SEC. 9. In an action governed by this Act, evidence of Federal, State, or local income tax liability or any Social Security or other payroll tax liability attributable to past or future earnings, support, or profits and the present value of future earnings, support, or profits alleged to have been lost or diminished because of harm arising out of a general aviation accident is admissible regarding proof of the claimant's harm.

PUNITIVE DAMAGES

SEC. 10. (a) Punitive damages may be awarded in an action under this Act for harm arising out of a general aviation accident only if the claimant establishes by clear and convincing evidence that the harm suffered was the direct result of conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by use of the general aviation aircraft involved.

(b) Evidence regarding the financial worth of a defendant or the defendant's profits or any other evidence relating solely to a claim for punitive damages under this Act is not admissible unless the claimant establishes, before any such evidence is offered, that the claimant can present evidence that will establish prima facie proof of conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by use of the general aviation aircraft involved.

(c) In any civil action in which the alleged harm to the claimant is death and the applicable State law provides, or has been construed to provide, for damages only punitive in nature, a defendant may be liable for any such damages pursuant to the provisions of this Act regardless of whether a claim is asserted under this section. The recovery of any such damages shall not bar a claim under this section.

TIME LIMITATION ON BRINGING ACTIONS

SEC. 11. (a) Any action for harm arising out of a general aviation accident shall be barred, notwithstanding any State law, unless—

(1) the complaint is filed within two years after the date on which the accident occurred which caused the claimant's harm; and

(2) the summons and complaint are properly served upon the defendant within one hundred and twenty days after the filing of such complaint, unless the party on whose behalf such service is required can show good cause why such service was not made within such one-hundred-and-twenty-day period.

Paragraph (2) of this subsection shall not apply to service of process in a foreign country pursuant to rule 4(i) of the Federal Rules of Civil Procedure of any similar State law.

SANCTIONS

SEC. 12. It is the intent of Congress that, with respect to any action governed by this Act, the sanctions for violation of rule 11 of the Federal Rules of Civil Procedure, including orders to pay to the other party or parties the amount of their reasonable expenses, including a reasonable attorney's fee, be strictly enforced.

JURISDICTION

SEC. 13. (a) The district courts of the United States, concurrently with the State courts, shall have original jurisdiction, without regard to the amount in controversy, in all civil actions for harm arising out of a general aviation accident and in all actions for indemnity or contribution described in section 6(d) of this Act.

(b) A civil action which is brought in a State court may be removed to the district court of the United States for the district embracing the place where the action is pending, without the consent of any other party and without regard to the amount in controversy, by any defendant against whom a claim in such action is asserted for harm arising out of a general aviation accident.

(c) In any case commenced in or removed to a district court of the United States under subsection (a) or (b) of this section, the court shall have jurisdiction to determine all claims under State law that arise out of the same general aviation accident, if a substantial question of fact is common to the claims under State law and to the Federal claim, defense, or counterclaim.

(d)(1) A civil action in which the district courts of the United States have jurisdiction under subsection (a) of this section may be brought only in a district in which—

(A) the accident giving rise to the claim occurred; or

(B) any plaintiff or defendant resides.

(2) In an action pending in a district court of the United States under paragraph (1) of this subsection, a district court may, on motion of any party or its own motion, transfer the action to any other district for the convenience of parties and witnesses in the interest of justice.

(3) For purposes of this subsection, a corporation shall be considered to be a resident of any State in which it is incorporated or licensed to do business or is doing business.

SEVERABILITY

SEC. 14. If any provision of this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected by such invalidation.

EFFECTIVE DATE

SEC. 15. (a) This Act shall apply to any civil action for harm arising out of a general aviation accident which is filed on or after the date of enactment of this Act.

(b) If an action governed by this Act is filed within one hundred and eighty days after the date of enactment of this Act, liberal leave shall be given to a party to amend any pleading, motion, statement of jurisdiction or venue, or other matter to conform to the provisions of this Act.

VI. SECTION-BY-SECTION ANALYSIS

The Judiciary Committee acknowledges and generally adopts the section-by-section description of this bill found in the Commerce Committee report, S. Rept. 101-223. Minor modifications have been made to more clearly articulate the majority views of the Judiciary Committee regarding this legislation.

Section 1.—Short title

This section contains the short title of the legislation, the General Aviation Accident Liability Standards Act of 1989.

Section 2.—Findings and purpose

Subsection (a) sets forth Congressional findings regarding the necessity for the legislation.

Subsection (b) states that the purpose of the bill is to establish standards for determining liability for harm arising out of general aviation accidents.

Section 3.—Definitions

This section contains definitions of eight terms used in the bill. Paragraph (4) defines "general aviation aircraft" to include all aircraft which have been issued a type certificate or airworthiness certificate by the FAA; at the time the certificate was issued had a maximum seating capacity of less than 20 passengers; and were not, at the time of the accident, engaged in scheduled passenger carrying operations.

Paragraph (5) defines "general aviation manufacturer" to include their builder of the airplane, engine, or any system, component, subassembly, or other part of a general aviation aircraft.

Paragraph (6) defines the term "harm" to include property damage, bodily injury, death resulting from bodily injury, pain and suffering caused by such bodily injury, and emotional harm caused by such bodily injury.

Section 4.—Preemption; applicability

Section 4(a) provides that this bill supersedes any State law regarding recovery, under any legal theory, for harm arising out of a general aviation accident, to the extent that this bill establishes a rule of law or procedure applicable to the claim. With respect to matters not addressed by this bill, courts may make reference to applicable State law.

Section 4(b) provides that this bill shall not be construed to supersede, waive, or affect any defense of sovereign immunity asserted by the United States or any State.

Section 4(c) provides that this bill shall not be construed to affect liability with respect to any aircraft that is not a general aviation aircraft for damages arising out of the operation of an aircraft that is not a general aviation aircraft. This provision is intended to insure that this bill will not be construed to limit or affect the liability of manufacturers of large commercial aircraft or the owners or operators of aircraft used in scheduled airline operations.

Section 4(d) provides that no right of action for harm exists under this bill if the right would be inconsistent with the provisions of any applicable workers' compensation law. The intent of this provision is to maintain the employer's immunity from tort liability for injuries to its employees to the extent provided under applicable State workers' compensation law.

Section 4(e) provides that the bill applies to manufacturers, owners, or operators of any general aviation aircraft, and any person who repairs, maintains, or provides any other support for such an aircraft. The bill also applies to occupants of general aviation aircraft, persons who bring an action on behalf of such an occupant, and nonoccupants if they are bringing an action based on harm to an occupant. For example, the surviving spouse of an occupant killed in a general aviation accident may bring an action for bereavement or loss of consortium. That action would be subject to the provisions of the bill since it arises out of harm to an occupant of a general aviation aircraft.

The bill does not apply to actions brought by or on behalf of nonoccupants for their own injuries caused by a general aviation aircraft, such as persons on the ground at the time of an accident. The bill also has no application to occupants of, or to manufacturers, owners, or operators of, any non-general-aviation aircraft or any other mode of transportation that may be involved in an accident with a general aviation aircraft. However, the fact that a general aviation aircraft may be involved in an accident with a non-general-aviation aircraft does not negate the application of the bill to the manufacturers, owners, operators, or occupants of the general aviation aircraft.

Section 5.—Uniform standards of liability for general aviation accidents.

Section 5 provides that liability for harm arising out of a general aviation accident may be established on the basis of negligence or, in three circumstances, an alternative standard.

Subsection (a) provides that any person claiming damages for harm arising out of a general aviation accident may bring an action and may recover damages from a party, if such party was negligent and such negligence is a proximate cause of the claimant's harm. The terms negligent and negligence are not defined in the bill, but are intended to be consistent with the definitions contained in the Restatement (Second) of Torts (1965). See sections 281-282. In order to recover under subsection (a), a claimant must prove that the defendant engaged in conduct which falls below the

standard necessary to protect others against unreasonable risk of harm and that the conduct was the proximate cause of the harm.

Subsection (b)(1) provides for liability based on defects in design or construction. Liability against a general aviation manufacturer may be established by the claimant's demonstrating that (1) the product left the control of the manufacturer in "a defective condition unreasonably dangerous for its intended purpose, according to engineering and manufacturing practices which were reasonably feasible", (2) the defect is a proximate cause of the harm, and (3) the aircraft was being used at the time of the accident for a purpose and in a manner for which it was designated and manufactured.

The phrase "defective condition unreasonably dangerous for its intended purpose" is not defined in the bill, but is intended to incorporate the standard of strict liability for products set out in the Restatement (Second) of Torts at section 402A (1965). The Restatement uses the same phrase to establish liability for products. A large majority of States has now adopted this section of the Restatement as their State law.

Determination of the defective condition of the product under the bill, an issue not addressed in Section 402A of the Restatement, would involve consideration of engineering and manufacturing knowledge which was reasonably feasible at the time the product left the manufacturer's control (often referred to as the "state of the art") as part of the plaintiff's prima facie case. Courts have recognized, and the Committee determined, that the analysis should focus on technology at the time of manufacture as opposed to current knowledge as of the time of the accident. See, e.g., *Bruce* v. *Martin-Marietta Corp.*, 544 F.2d 442, 447 (10th Cir. 1976) (evidence of the state-of-the-art at the time the airplane was made is relevant to a strict liability claim); *McLaughlin* v. *Sikorsky Aircraft*, 195 Cal. Rptr. 764, 767 (1938) ("Among the relevant factors, and securely within the manufacturer's knowledge, are the feasibility and costs of an alternative design [citation omitted]. It seems apparent that evidence the design comports with the state of the art is relevant to a proper determination of such costs and feasibility factors.").

A claimant also must prove, as part of a prima facie case under the bill, that the aircraft was being used at the time of the accident within the operating limits for which it was designed and manufactured. This section is intended to encourage responsible, safe, and legal operation of aircraft.

Subsection (b)(2) establishes a cause of action against a general aviation manufacturer for failure to provide warnings or instructions. The manufacturer is liable, if at the time the product left the manufacturer's control, the manufacturer (1) knew or should have known about a danger connected with the product; and (2) failed to provide warnings or instructions that a person exercising reasonable care would have provided with respect to the danger, unless such warnings would not have materially affected the conduct of the users of the product. The manufacturer is also liable if, after the product left the manufacturer's control, the manufacturer knew or reasonably should have known about a danger connected with the product, and failed to provide warnings or instructions

that would have been provided by a person exercising reasonable care, unless such warnings would not have materially affected the conduct of the user of the product. In all instances, the failure to warn must be a proximate cause of the claimant's harm.

Subsection (b)(3) establishes a cause of action against a manufacturer arising out of an express warranty provided by the manufacturer. Liability exists if (1) the manufacturer makes an express warranty with respect to the product, (2) the warranty relates to the aspect of the product which caused the harm, (3) the product fails to conform to the warranty, and (4) the failure to conform to the warranty is a proximate cause of the harm. The focus is on the product's failure to conform to express representations about it made by the manufacturer. There is no requirement that the warranty be in writing in order to form the basis of liability.

This provision reflects generally accepted law which establishes strict liability to the consumer based on express representations made to him about the product. See Prosser, "Law of Torts" (4th Ed. 1971) section 97 at 651-2. Similarly, the Restatement (Second) of Torts (1975) at section 402B states that a manufacturer whose product fails to conform to the manufacturer's own express warranty about at material fact concerning the character or quality of the product is subject to liability for harms caused by the justifiable reliance upon the express warranty. This liability arises even though the warranty is not made fraudulently or negligently, and even though there is no contractual relationship between the claimant and the manufacturer. Id.

Subsection (c) establishes a defense to actions brought based on subsection (b). Paragraph (1) provides that a manufacturer shall not be liable if the manufacturer proves, by a preponderance of the evidence, that a defective condition could have been corrected by compliance with either an FAA airworthiness directive or a manufacturer's service bulletin. The directive or bulletin must have been issued within a reasonable time before the accident occurred, and after the product left the control of the manufacturer.

The FAA issues airworthiness directives (49 App. U.S.C. 1421; 14 C.F.R. 39.11 (1988)) and manufacturers issue service bulletins to notify aircraft owners, operators, and other interested persons of an unsafe condition, in order to ensure the airworthiness and operational safety of the aircraft. It is the owner or operator of the aircraft, not the manufacturer, who has the primary legal responsibility for maintaining the aircraft in an airworthy condition, including compliance with airworthiness directives. See 14 C.F.R. 91.163(a), 91.173(a)(2)(v) (1988). Thus, when an airworthiness directive or service bulletin is used after the product leaves the manufacturer's control and at a point in time before the accident which would have provided a reasonable time for the defective condition to be corrected, it is reasonable to require the owner or operator to bear the responsibility for failure to correct the defective condition.

Paragraph (2) of subsection (c) permits evidence of compliance with FAA standards, conditions, or specifications to be admissible in actions governed by subsection (b) with regard to the defective condition of a product. This is not an absolute defense, only evidence to be considered by the trier of fact. The provision reflects established case law which upholds the right of a manufacturer to

introduce evidence of compliance with Federal safety standards. See, e.g., *Wilson* v. *Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978); *Hager* v. *Mooney Aircraft, Inc.*, 407 N.Y.S. 2d 978 (1978); *Bruce* v. *Martin-Marietta Corp.*, 544 F.2d 442 (10th Cir. 1976). See also, Shapo, "The Law of Products Liability", (1987) para. 11.03[5] at 11-12.

Section 6.—Comparative responsibility

This section estabishes a general rule of comparative responsibility among the parties to an action covered by the bill. Under this rule a claimant's recovery is not precluded by the claimant's own negligence but is merely reduced in proportion to the claimant's percentage of responsibility.

Subsection (a) states that the claimant's negligence reduces the amount of damages payable in proportion to the percentage of responsibility attributable to the claimant. It requires the trier of fact to determine comparative responsibility by making a determination of the respective percentage of responsibility for the claimant's harm attributable to the claimant, each defendant, and persons not parties to the action. The claimant's damages are thus reduced by an amount in proportion to the claimant's percentage of responsibility. For example, if the trier of fact determines that defendant A is 40 percent responsible for the harm, defendant B is 40 percent responsible, and the claimant is 20 percent responsible, the claimant's recovery will be limited to a maximum of 80 percent of the total damages. The claimant can recover from a defendant even if the claimant is proportionately more responsible for the harm, although the claimant's damages will be reduced in accordance with his or her proportionate responsibility.

Subsection (b) establishes, subject to exceptions in subsection (c), that each defendant's liability shall be several, but not joint, and in proportion to the defendant's share of the responsibility for the claimant's harm.

Subsection (c) establishes two exceptions to subsection (b) and provides for joint and several liability in two circumstances. First, a manufacturer who is the builder or manufacturer of the airframe of the aircraft involved in an accident is jointly and severally liable when the harm is caused by a defective system, component, subassembly, or other part of the aircraft that the manufacturer either installed or certified as part of the original type design. Second, a manufacturer of a system or component of the aircraft is jointly and severally liable for harm caused by a defective subassembly or other part of such sustem or component.

Subsection (d) provides that any persons jointly liable under this section shall have the right to bring an action for indemnity or contribution from any person with whom they are jointly liable.

Section 7.—Time limitation on liability

This section establishes a time limit after which an aviation manufacturer no longer has any liability for harm caused by an aircraft, often referred to as a statute of repose. Subsection (a)(1) provides that no action alleged to have been caused by an aircraft may be brought for harm which occurs more than 20 years from either (A) the date of delivery of the aircraft to its first purchaser if

delivered directly from the manufacturer, or (B) the date of first delivery to a person engaged in selling or leasing aircraft. Paragraph (2) deals with replacement or additional parts or systems. In a case alleging harm caused by a system, component, subassembly, or other part which replaced a part or was added to the aircraft, the 20-year time limit does not begin to run until the date of the replacement or addition.

Subsection (b) provides that the 20-year time limit does not apply if there is an express warranty from the manufacturer or seller of the product causing the harm that it would be suitable, for the purpose intended, for a period longer than 20 years. In such instances, the manufacturer would be liable for the longer period provided in the warranty.

Subsection (c) makes clar that the time limitations in section 7 do not affect a manufacturer's duty, after the sale or lease of an aircraft, to provide additional or modified warnings or instructions regarding the use or maintenance of an aircraft, system component, or part.

Section 8.—Subsequent remedial measures

This section expressly adopts Rule 407 of the Federal Rules of Evidence for actions covered by the bill. It provides that evidence of any measure taken offer an event which, if taken previously, would have lessened the likelihood of the event's occurring, is inadmissible to prove liability, and is admissible only to the extent permitted by Rule 407. The primary basis for this rule is the social policy of encouraging people to take steps in furtherance of added safety. Additionally, there is some question as to whether such evidence is relevant to issues of liability at the time the product was made. See, Notes of Advisory Committee on Proposed Rules to Rule 407, Federal Rules of Evidence. Section 8 is intended to encourage general aviation manufacturers to improve the safety of their products without the fear that such evidence could be used against them in cases involving older products.

Under this section evidence of subsequent remedial measures is admissible to the extent permitted under Rule 407, which provides that such evidence is admissible to prove ownership, control, feasibility of precautionary measures, if controverted,or impeachment.

Section 9.—Admissibility of certain evidence

This section provides that evidence of the tax liability attributable to past or future earnings, support, or profits alleged to have been lost or diminshed as a result of an accident is admissible in connection with the proof of the claimant's harm, as is evidence of the present value of future earnings, support, or profits alleged to have been lost or diminished. The U.S. Supreme Court has recognized the admissibility of evidence of tax consequences of damages awarded to the claimant in claims arising out of injuries to railroad workers. *Norfolk & Western Ry.* v. *Liepelt*, 444 U.S. 490, 498 (1980).

Section 10.—Punitive damages

This section establishes the standard for awards of punitive damages in general aviation liability actions. Subsection (a) provides

that punitive damages may be awarded only if the claimant establishes by clear and convincing evidence that the harm was "the direct result of conduct manifesting a conscious, flagrant indifference to . . . safety . . ." A mere failure to exercise reasonable care does not amount to the conduct necessary for awarding punitive damages. Punitive damages serve the function of punishing the defendant for outrageous conduct and deterring such conduct in the future by the defendant and by others. For this reason, such damages generally are given to the claimant over and above the full compensation for the claimant's injuries. See Restatement (Second) of Torts section 908(1) (1965). Because of the basis and nature of such damages, they have been said to have some elements of criminal penalties. See Prosser, "Law of Torts" (4th ed. 1971) at 9. For this reason, the standard of proof used in this section, "clear and convincing evidence," is higher than the "preponderance of the evidence" standard generally applied in tort actions, but lower than the criminal law standard of proof "beyond a reasonable doubt."

Subsection (b) limits the admissibility of evidence regarding the financial worth of a defendant or other evidence relating solely to punitive damages. Such evidence is admissible only if the claimant can establish, before the evidence is offered, the ability to present prima facie proof of the existence justifying an award of punitive damages.

Subsection (c) relates to wrongful death actions where applicable State law provides that only damage termed "punitive" are recoverable. See Ala. Code section 6-5-410. In such situations, punitive damages are in fact a substitute for compensatory damages. Subsection (c) provides that a defendant may be liable for any such damages, regardless of whether a showing is made as required by section 10. The subsection further provides that recovery of such punitive damages under State law will not bar a claim under section 10.

Section 11.—Time limitation on bringing actions

Section 1 preempts State law statutes of limitations, establishing the time within which actions may be brought, with respect to actions governed by the bill. If an action is not brought within the specified time period here two years, the action is barred. Statutes of limitations encourage the prompt filing and resolution of claims. The longer a claimant waits to file his or her action, the greater the likelihood that the evidence will have become "stale" and recollection of facts will have diminished. Paragraph (1) of subsection (a) provides that any action arising out of a general aviation accident is barred if a complaint is not filed within two years after the date on which the accident occurred.

Paragraph (2) provides that the summons and complaint must be properly served within 120 days after the filing of the complaint. The section provides for an exception from the service requirement for good cause, or in cases of service of process in foreign countries pursuant to Rule 4(i) of the Federal Rules of Civil Procedure or similar State law. The purpose of this provision is to ensure that the defendant receives timely notice of the complaint so that he or she may have a reasonable opportunity to investigate the facts and respond.

Section 12.—Sanctions

This section requires the strict enforcement of the sanctions provided for by Rule 11 of the Federal Rules of Civil Procedure, in actions governed by the bill.

Rule 11 requires that every pleading or other paper filed with the court be signed by any attorney or by any party who is not represented by an attorney. The Rule provides that, in both cases, the signature constitutes a certificate by the signer that he or she had read the paper to be filed, and that to the best of his or her knowledge, formed after reasonable inquiry, the filing is well grounded in fact and law, and not filed for any improper purpose such as delay. If a filing is signed in violation of this Rule, the court shall impose upon the person who signed it an appropriate sanction, which may include reasonable expenses incurred because of the filing, including a reasonable attorney's fee.

Section 12 states that sanctions for violation of this Rule should be strictly enforced in actions covered by this bill.

Section 13.—Jurisdiction

Subsection (a) provides for jurisdiction in Federal district courts, concurrent with State courts, over civil actions arising our of general aviation accidents, without regard to the amount in controversy. Claims arising under this bill arise under Federal law and are appropriately Federal question cases. Federal court jurisdiction is warranted on that basis.

Subsection (b) permits a defendant in such an action in State court to remove the action to Federal district court without the consent of any other party, and without regard to the amount in controversy.

Subsection (c) gives the Federal district court in such cases jurisdiction to determine all claims arising under State law if a substantial question of fact is common to the State law claims and the Federal claim, defense, or counterclaim. This subsection will apply particularly if issues are present in the case which are not addressed by this bill so that State law is not preempted, or if the accident at issue involves a non-general-aviation means of transportation to which this bill would not apply. Providing jurisdiction over all claims arising out of the same accident should promote efficient use of judicial resources.

Subsection (d) provides that venue of such a case in Federal court may be in the district in which the accident occurred, or in which any plaintiff or defendant resides. Transfer of venue is permitted on the court's own motion or the motion of any party, for the convenience of parties and witnesses, in the interest of justice.

Subsection (d)(3) provides that, for purposes of subsection (d), a corporation is considered a resident of any State in which it is incorporated, licensed to do business, or doing business.

Section 14.—Severability

This section provides that if any provision of the bill, or the application of any provision to any person or circumstance, is held in valid, the remainder of the bill and its application to any other person or circumstance shall be unaffected.

Section 15.—Effective date

This section makes the bill applicable to any civil action otherwise covered by the bill which is filed on or after the date of enactment of the bill. It further provides that, for any action governed by the bill and filed within 180 days after enactment of the bill, a party shall be given liberal leave to amend any filing to conform with the provisions of the bill. This provision is intended to assure that parties will be given the opportunity to amend compliants, motions, or other filings to conform to the substantive provisions of law established under the bill.

VII. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 6, 1990.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 640, the General Aviation Accident Liability Standards Act of 1989, as reported unfavorably by the Senate Committee on the Judiciary, April 5, 1990. CBO estimates that enactment of the bill would result in no significant cost to the federal government and in no cost to state or local governments.

S. 640 would establish federal standards for determining liability for injuries or property damage arising out of general aviation accidents. Specifically, the bill would establish standards applicable to the liability of general aviation manufacturers as well as defenses available to them.

Both state and federal courts would have jurisdiction over general aviation accident liability cases under this act, but actions brought in a state court could be removed to a federal district court by any defendant without the consent of any other party. The bill would preempt state law to the extent that it establishes a rule of law or procedure applicable to a claim, but would not affect sovereign immunity defenses or workers' compensation law.

If you wish further details on this estimate we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

VIII. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that this act will not have direct regulatory impact.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule of XXVI of the Standing Rules of the Senate, the committee states that the bill as reported would make no change to existing law.

ADDITIONAL VIEWS OF SENATOR METZENBAUM

I voted to report the aviation liability bill from the Judiciary Committee with a negative recommendation because I continue to be concerned that this bill limits too severely the ability of people to recover for injuries and death incurred in general aviation accidents.

In spite of my longstanding opposition to the bill, I believe that the arguments of those who support this bill have some merit. I believe the questions raised by these advocates are not insoluable and I urge those who oppose the bill to sit down with those who support it and try to work out ways to resolve this dispute.

HOWARD M. METZENBAUM.

ADDITIONAL VIEWS OF SENATOR HERB KOHL

The general aviation industry has raised some valid concerns about the impact of product liability and insurance costs on the production of light aircraft. These and other costs have hampered the ability of manufacturers to make affordable aircraft available to general aviation pilots, such as those represented by the Experimental Aircraft Association in my State. While I do not endorse all the provisions of this legislation, the bill does deserve further consideration by the full Senate. I urge my colleagues to carefully examine its provisions.

ADDITIONAL VIEWS OF SENATOR THURMOND

The General Aviation Accident Liability Standards Act, S. 640 is complex legislation. Although this bill has some provisions that warrant consideration, I am concerned with portions of the bill which take certain rights from the States. However, I supported the Judiciary Committee's effort to report this bill to the floor to enable full Senate consideration. I reserve my rights on the floor to offer any amendment or take any position I deem appropriate at that time.

The General Aviation Accident Liability Standards Act seeks to provide uniform Federal standards of liability for general aviation accidents. Introduced by Senator Kassebaum, this bill was favorably reported by the Commerce Committee on November 21, 1989. As the bill related to the standards of liability governing general aviation, non-commercial aircraft seating 20 or fewer passengers, and involves the jurisdiction of the Federal courts, it was sequentially referred to the Judiciary Committee for consideration.

As reported, S. 640 contains certain provisions which cause me serious concern. First and foremost, S. 640 would preempt State law by providing uniform standards of liability for claims arising out of general aviation accidents. Therefore, it would take from individual States the right to determine their own standard of liability for claims resulting from these kinds of accidents. Before we take away the right of States to determine their own liability standards, careful thought and consideration must be undertaken to assure that such intervention in the affairs of individual States and their respective legislative bodies is appropriate.

There are several other provisions in this bill that should be considered if this legislation is acted on by the full Senate. These provisions relate to the removal of any case filed in State court to Federal court, a statute of repose, a shift to comparative responsibility, and punitive damages.

For the above reasons, I reserve my rights on the floor to offer any amendments to S. 640, or take any position I deem appropriate at that time.

MINORITY VIEWS OF SENATORS HATCH, SIMPSON, GRASSLEY, AND HUMPHREY

The General Aviation Accident Liability Standards Act, already favorably reported by the Commerce, Science and Transportation Committee, is a modest and fair approach to establishing uniform Federal product liability standards for harm arising from general aviation accidents. It deserves the support of the Senate.

Manufacturers and aviation consumers alike identify product liability costs as the greatest single obstacle to the survival and success of the U.S. light aircraft industry, and to the continued safe operation of the active fleet. They agree that S. 640 is an appropriate Federal remedy to the problem.

In the present product liability environment, a general aviation manufacturer's liability can extend virtually forever. This has proven detrimental to U.S. manufacturers as they are forced to defend lawsuits for airplanes that left their control as long as 40 years earlier, and that may have been altered, flown or maintained in ways not approved by the manufacturer or the Federal Aviation Administration.

THE INDUSTRY DURING THE 1980'S

During the past 10 years, product liability costs shouldered by American general aviation manufacturers were the prime contributor to a dramatic change in the industry. Paid claims and out-of-pocket defense costs increased tenfold, resulting in a sharp increase in prices and an equally sharp decline in industry shipments to a record low of 1085 units in 1987—less than 10 percent of the 17,048 airplanes shipped in 1979.

This long and precipitous decline defied the historical relationship between real GNP and industry shipments. According to the Department of Transportation, the two had moved in tandem prior to 1980. Nevertheless, general aviation shipments plunged despite a period of growth in the U.S. economy and an excellent and ever-improving industry safety record. As a result of this depression, several plants were closed, entire product lines were discontinued, and about 65 percent of the manufacturing jobs were lost.

From the Majority Report, one is led to believe that the industry is returning to the stature it had enjoyed from the end of World War II through the 1970's. However, a broad view of industry units shipments reveals that 1989—with 1,535 units—was the fourth worst year for unit shipments since the industry began keeping records in 1946. And, 1989 units were only 10 percent of the 17,048 units shipped in 1979. Further, a comparison of the shipments of aircraft by the three major U.S. light aircraft manufacturers—Beech, Cessna and Piper—shows the committee majority view to be far too rosy.

In 1979, Beech alone shipped the rough equivalent to the entire 1989 total.

	1979 total shipments	1989 total shipments	Trend (percent)
Beech	1,308	371	Down 75
Cessna	8,400	183	Down 98
Piper	5,255	621	Down 88

Other sectors of the light aircraft industry have felt the impact of product liability as well. Aircraft owners and operators are finding new aircraft and replacement parts to be expensive and scarce. Vital community services that depend on general aviation are being put at risk, including air ambulance services, law enforcement agencies, crop dusting services, and pilot training. Pilot training in particular is hurting as only one U.S. company—Piper Aircraft—manufactures a two-seat, single piston engine trainer. Industry analysts have predicted a pilot shortage due to growing U.S. air traffic demands, yet most U.S. companies cannot afford to produce the aircraft needed to train student pilots.

IMPACT OF LEGISLATION

By establishing a uniform product liability standard for general aviation, S. 640 would benefit the industry in the following ways:

1. *Liability standards.*—The bill would remove much of the uncertainty in the current tort system by making clear the circumstances under which a party is liable. S. 640 sets specific standards for liability: manufacturer's negligence, defective condition of the product (strict liability), manufacturer's failure to warn of a known danger, and the product's failure to conform to a manufacturer's express warranty. Such a Federal standard is entirely appropriate for an industry that is almost completely federally regulated.

2. *Statute of repose.*—S. 640 would set a reasonable time limit on a manufacturer's liability—20 years. This would apply to new products as well as replacement components. However, this limit would in no way change FAA regulations requiring a manufacturer to warn of defects and prescribe remedies throughout the life of the aircraft.

3. *Comparative responsibility.*—S. 640's comparative responsibility provision would put a stop to the manufacturer with "deep pockets" being financially liable in circumstances where other defendants are not prepared to pay their portion of the court-determined amounts of reparation. A manufacturer is often made to pay a lion's share of the damages, even though a court determines it caused only a fraction of the harm to the plaintiff. This shared liability puts at risk the thousands of employees and their families that depend on the viability of the general aviation manufacturer for their livelihood.

Use of the rule of comparative responsibility will motivate all defendants including owners, operators, and mechanics to carry adequate levels of insurance, because the financial responsibility would fall on the culpable parties.

4. *Punitive damages.*—The bill would limit the circumstances in which a plaintiff can press for punitive damages to accidents in which it is proven by clear and convincing evidence that the harm was the direct result of a flagrant indifference to safety—a provision common in many State laws today.

5. *Innovation.*—In an indirect way, S. 640 would remove disincentives for innovation. For many years, product liability costs have eroded assets and resources—time, people, and money—that would have otherwise been spent on the advancement of aviation. Additionally, manufacturers would be less hesitant to introduce new technology and systems. Today, in many cases, the introduction of innovative components is deterred because of potential liability exposure for earlier vintage equipment.

CLARIFYING SOME PROVISIONS OF S. 640

During committee consideration and markup of S. 640, several statements were made in opposition to the bill which distort the intent of the legislation or reflect a misunderstanding of its provisions.

No. 1: S. 640 should not be characterized as "one-sided" and "horrible for the injured"

(A) The bill clearly establishes a uniform set of standards by which a manufacturer would be liable, including manufacturer's negligence, defective condition of the product (strict liability), manufacturer's failure to warn of a known danger, and the product's failure to conform to a manufacturer's express warranty. This uniform standard would inject a degree of certainty and predictability into the tort system. Thus, it would supersede the patchwork of State laws under some of which the injured party would now automatically lose.

(B) S. 640 neither imposes caps on the amounts for which a person claiming damages may sue nor places constraints on the attorney contingency fee system.

(C) The bill's statute of repose, a product of compromise with opponents, was lengthened from 12 to 20 years during Senate Commerce Committee action in the 99th Congress. It is far more lenient than any existing State statutes of repose.

(D) S. 640 does not alter a manufacturer's responsibility to warn of defects and prescribe remedies. In fact, the bill codifies Federal laws addressing these requirements.

(E) The bill does not limit an injured party's right to seek redress. It would simply limit a manufacturer's strict liability for products in service for over 20 years.

(F) S. 640 excludes persons on the ground who might be injured by a general aviation accident.

(G) The bill is enthusiastically supported by all aviation consumer groups.

No. 2: S. 640's Statute of Repose would not allow a manufacturer to shirk its responsibilities to aircraft owners

Federal Aviation Administration regulations, codified in section 7 of S. 640, are very clear on a manufacturer's responsibility to warn of defects and prescribe remedies.

FAA Federal Aviation Regulation (FAR) Part 21.3 directs a manufacturer to notify FAA immediately of any failure, malfunction, or defect in any product, part, process, or article. The rule carries with it a stiff penalty of $10,000 per day, per airplane for noncompliance.

FAR Part 21.99 directs a manufacturer to make design changes that correct unsafe conditions of a product, and submit them to FAA for approval. Upon approval, the manufacturer must then make information on the design changes available to all operators of the same type of product. Again, there is a stiff penalty of $10,000 per day, per airplane for noncompliance. And, again, the regulation applies to all airplanes made by the particular company, regardless of the number or age of such airplanes.

No. 3: S. 640's 20-year statute of repose would not deprive victims of a "forum of redress" in 50 percent of general aviation accident cases

It is true that over 50 percent of the 210,000 active aircraft in the general aviation fleet are now more than 20 years old. But data from the National Transporation Safety Board indicates that the primary cause of 90 percent of general aviation fatal accidents is pilot error. The remaining 10 percent of fatal acidents have a variety of causes, including adverse weather, poor aircraft maintenance, air traffic control errors, and a few instances of design or manufacturing defects. S. 640, therefore, will allow injured parties to seek damages from the parties who cause an accident, including manufacturers.

Moreover, a statute of repose does not create an absolute defense. A claimant could still bring an action against a manufacturer under negligence, fraud, or failure to warn theories.

Nothing tests the quality of an aircraft design or manufacture better than real-world use over a long period of time. General Aviation manufacturers contend that their aircraft, if properly maintained and inspected, can have almost unlimited life. As new aircraft model design or manufacturing defects are uncovered, manufacturers alert owners, prescribe remedies, and accept liability where it is appropriate. Almost all—over 95 percent—of these problems are uncovered in the first eight years of a new aircraft model's life. S. 640 recognizes that after 20 years of real-world testing, an aircraft's original design and manufacture have been thoroughly proven, and they should not be considered in liability claims.

The material problems which surface in the latter years of an aircraft's life can be remedied with proper maintenance and inspection. S. 640 insures that manufacturers *always* retain their responsibility to inform owners of additional maintenance or inspections that may be required as an aircraft ages. If a manufacturer fails to

comply with this responsibility, the company would be liable for subsequent accidents regardless of the aircraft's age.

No. 4: S. 640's Statute of Repose does take into account the effects of metal fatigue and other aging aircraft issues

Nothing in S. 640 should be construed to preempt FAA requirements for a manufacturer to provide owners and operators of general aviation products with the information necessary to increase vigilance against problems that affect an older airplane's airworthiness.

In fact, the General Aviation Manufacturers Association is instituting a Continuing Airworthiness Program for older aircraft, the result of an intensive look at such aircraft that began in 1986. The most important component of this program is a new inspection document to be issued for certain makes and models of aircraft. Based upon the manufacturer's knowledge of a particular airplane's service experience, the document will direct the owner to parts or systems to be inspected and actions to be taken if a problem is found.

No. 5: The Beech Bonanza V-tail, designed in the 1940's is not an example of where the aircraft manufacturer would have been excused from any liability; 200 of these aircraft did not "fall apart" in the air

According to Beech Aircraft, 10,403 Bonanza V-tail airplanes were delivered between 1947 and 1982. The accidents in question are a compilation of occurrences over 35 years. The problems of the Bonanza V-tail stemmed from aerodynamic characteristics that were unknown when this high-performance airplane was designed. Only after an extended Beech/FAA program were the original deficiencies identified and corrected. The aircraft was improved as a result of this govnernment-industry program, not lawsuits.

The 200 aircraft did not simply "fall apart" in the air. They were pulled apart by massive aerodynamic loads. Two addtional points are worth noting. First, virtually all where involved in adverse weather conditions beyond the capability of the pilot to properly handle. And second, Bonanza owners were repeatedly sent safety communiques calling attention to ther potential dangers and stressing safe operating procedures.

According to National Transportation Safety Board reports, most of the airplanes broke apart from the excessive speed on descent, often in unusual attitudes from pilots unable to cope with severe turbulence under "no visibility" conditions. The airplanes were certified to a prescibed Federal design specification, but the specification was not fully adequate for all foreseeable cases of aerodynamic loading that could act upon the V-tail. If properly handled in weather conditions within a pilot's capability, the airplanes, even before the Beech-designed and installed modification, were safe. The modification enhanced the margin of safety.

Today, according to the NTSB, the Bonanza V-tail is one of the safest single engine, retractable gear aircraft ever built. Also, it remains one of the most popular models among aircraft owners and pilots. The May 1990 edition of FLYING magazine pictures a Beech Bonanza V-tail on its cover and features it in its cover story on the "Ten Best Affordable Used Airplanes."

No. 6: S. 640 would not unfairly infringe on States rights with respect to the rights of the plaintiff

S. 640 does indeed supersede and preempt State law with respect to general aviation tort cases. Yet, the Department of Justice has determined that the bill is "less favorable for non-governmental defendants than the tort reform provisions already adopted in some States." In some cases, it would enhance plaintiff's rights.

As was made clear at hearings, the aviation industry (especially since passage of the FAA Act in 1958) is almost totally federally regulated—more than any other industry. The Federal Government oversees every aspect of the industry from the design and manufacture of aircraft and components parts to federal licensing of pilots and mechanics to the control of air traffic. The FAA prescribes physical, operational, and knowledge requirements before granting a license, and prescribes how, when and where to fly. FAA rules govern how to maintain an aircraft and who may maintain it. Even accident investigation is spearheaded by a federal authority. Yet, liability after an accident is decided based on laws which differ significantly from State to State. Such a federally regulated industry needs and deserves uniform liability standards.

Finally, the majority report inaccurately uses the term "limited Federal safety controls" and "minimal Federal safety standards" to describe the very comprehensive degree of FAA oversight. These statements are terribly misleading as they misquote the FAA Act of 1958 in both letter and intent. In the FAA Act, the words "minimum standards" are always used with the qualifying words "in the interest of safety" or "necessary for safety"—a big difference.

No. 7: S. 640 does not allow issuance of a service bulletin as a defense against lawsuits, nor could manufacturers "immune themselves" by issuing a number of such bulletins

Service bulletins—or whatever these FAA-approved service documents are called—are sometimes the basis of FAA-mandated airworthiness directives. Service bulletins are encouraged under FAR 21.99 (b) as a means to ". . . contribute to the safety of the product," based on service experience. The holder of the airplane's type certificate submits the appropriate change to the FAA Administrator for approval. If approved, the holder of the type certificate makes the information on its design changes available to all operators of the product.

Contrary to the majority report, the issuance of a service bulletin is not at the "complete discretion of the manufacturer".

CONCLUSION

In our view, this bill provides reasonable hope for the survival of an American industry that has been crippled by rising liability costs, without cutting off rights to injured parties. We consider S. 640 to be modest, fair and justified. We therefore urge our colleagues to adopt this legislation.